THE NEW-YORK
CITY-HALL RECORDER.

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At a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 5th day of *October*, in the year of our Lord one thousand eight hundred and eighteen—

PRESENT,

The Honourable
CADWALLADER D. COLDEN,
Mayor of the City of New-York.
ANTHONY L. UNDERHILL, *Alderman.*
JAMES WARNER, *Special Justice.*
PIERRE C. VAN WYCK, *Dist Atty.*
JOHN W. WYMAN, *Clerk.*

GRAND JURORS.

STEPHEN PRICE, *Foreman.*

ALEXANDER HOSACK,	W. A. STEWART,
JOHN YOUNGS,	R. I. RENWICK,
GEORGE WRAGG,	COLLIN REED,
JAMES P. VAN HORN,	G. S. MOUNT,
ROBERT TROUP, Jun.	W. L. LIPPINCOTT,
THOMAS TOBIAS,	N. LAWRENCE,
W. B. TOWNSEND,	W. HENDERSON,
EPHRAIM CONRAD,	T. SEYMOUR,
ASA WHITE,	T. C. PEARSALL.

(HOMICIDE—MANSLAUGHTER.)

NIEL PATTERSON'S CASE.

VAN WYCK, *Counsel for the prosecution.*
WILSON *and* DAVID GRAHAM, *Counsel for the prisoner.*

N. P. brought into the grocery store of M. a basket, which he suspected to be stolen from a cart near the store, and he, therefore, thrust the supposed thief from the store, who turned upon him to force his way back. R. P., a by-stander, interfered; and, while the other two were struggling near the grocery door, seized hold of N. P. to pull him back, saying, that he would not suffer him to carry into the store stolen property. At this stage of the affray, the owner of the basket came and claimed it. Whereupon N. P. either dropped it, or delivered it to the owner—*the struggle ceased*, and the parties were entirely separated. Then, and in a short time afterwards, N. P. struck R. P. a violent blow on his left shoulder, who asked him the reason of giving the blow, but made no resistance. N. P. still advanced on R. P. and struck him another blow on or under his left ear, who fell backwards, the back of his head striking the pavement, by means of which he died in about two hours. It was held, that this homicide was manslaughter.

The prisoner was indicted for manslaughter. The indictment, which contained six counts, alleged, in some of them, that the prisoner, on the 26th of August, 1818, in the sixth ward of this city, with his right hand clenched, unlawfully, violently, and in the fury of his mind, did strike and beat Robert Patterson, and on his left ear did inflict one certain blow, by means whereof he died; and in other counts it was stated, that he fell, by means of said blow, with the back of his head against the pavement, and thereby sustained another mortal blow; and the last counts alleged that the two bruises combined, occasioned his death.

After Van Wyck had opened the prosecution, he introduced Daniel M'Mullen as a witness, who stated that on the day laid in the indictment, between four and five o'clock in the afternoon, while the witness was engaged in attending the grocery store of Alexander Murray, in Augustus-street, then absent, the prisoner brought into the store a basket, which the witness suspected to have been stolen from a cart, then within call of the store. The witness seized and attempted to put him out of the store, and succeeded; but the prisoner attempted to force his way back, and while struggling in this attempt, Robert Patterson, who was on the stoop, seized hold of the prisoner from behind, to pull him back from the store, saying, that he should not carry stolen property there. The owner came up and claimed his basket, which the prisoner dropped—the struggle then ceased, the parties being entirely separated; when the prisoner, shortly afterwards, turned round, and, in anger, struck Ro-

bert Patterson a violent blow on the left shoulder, which did him little or no injury. He then asked the assailant why he struck him, but to this no reply was made: the blow was immediately repeated on or under the left ear, when the sufferer fell backwards, off the side walk, his head striking the pavement. He was taken up speechless, every attempt to relieve him proved ineffectual, and he expired in about two hours.

It further appeared that the deceased frequented this store for liquor, and was in habits of intoxication. The prisoner had lost his left hand, as his counsel alleged, in one of our naval contests with the Barbarians in the Mediterranean.

After the testimony had closed, the mayor directed the attention of the counsel to the two subjects of inquiry in the case:

1. Was the blow, inflicted by the prisoner, the cause of the death?

2. If so, does this homicide amount to manslaughter?

Before the counsel for the prisoner commenced their remarks to the jury, Van Wyck read from the 1st Vol. of East's Crown Law, page 279, a passage to show, that to reduce a homicide "from manslaughter to self-defence, upon chance medley, it is incumbent on the defendant to prove two things; 1st, that before a mortal stroke given, he had declined any further combat, and had retreated as far as he could with safety; 2dly, that he then killed his adversary through mere necessity, in order to avoid immediate death. And it seems that any case, which, without these two circumstances, would have amounted to more than manslaughter, cannot by their concurrence be *excused* upon the foot of self-defence upon chance medley; though a passage of Lord Hale may seem to countenance an exception to this remark. With the general position, however, above laid down, agrees Mr. Justice Blackstone, (4 Com. 184,) who says, that "the true criterion between homicide upon chance medley in self-defence and manslaughter seems to be, that when both parties are actually combatting at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer had not began to fight, or, having began, had endeavoured to decline any further struggle, and afterwards, being closely pressed by his antagonist, kill him to avoid his own destruction; this is homicide excusable in self-defence."

The counsel for the prisoner contended to the jury, that the homicide in this case was referrible to *chance medley* in self-defence and to *misadventure*. He was attacked unlawfully, by two persons at the same time, and though there was a separation between the parties for a short time before the mortal stroke was given, yet, from the commencement until the termination, this was a continued affray; and the prisoner, not being unlawfully engaged, was excusable; especially since he did not *intend* to kill his adversary.

Mr. Graham read to the court an authority (1 East's C. L. p. 286.) to show that "it is not unlawful for a man to strike with, or use whatever force may be sufficient to prevent another from beating him, (short of intentionally killing him, unless for the necessary preservation of his own life,) provided he cannot escape from the blows by any other means, *and did not bring upon himself such ill treatment by his illegal act.* And therefore it may be a question, whether, under such circumstances, the death may not be attributed to misadventure; being unintentional in the party striking, who was, in that instance, doing no more than he lawfully might.

Van Wyck contended, that at the time the mortal blow was inflicted, the prisoner was unlawfully engaged; and as this was a voluntary act of killing, his offence amounted to manslaughter, and could not be referred either to misadventure or chance medley in self-defence.

The counsel read to the jury Nailor's case, from 1 East's Crown Law, p. 277. "The prisoner was indicted for the murder of his brother. It appeared that he came home drunk on the night the act was committed: his father ordered him to go to bed, which he refused to do: whereupon a scuffle happened between them, when the deceased, then in bed, got up, and fell on his brother and beat him while lying down, and not being able to avoid the blows or escape. While in this situation, the prisoner gave the

deceased a mortal wound with a penknife. After a conference of all the judges in Michaelmas term, 1704, it was unanimously held to be manslaughter, as there did not appear to be any *inevitable necessity*, so as to excuse the killing *in that manner*."

The mayor, in his charge to the jury, directed their attention to two general questions:

1. Whether the blow occasioned the death, and,

2. Whether, allowing this to be the case, the offence amounted to manslaughter.

That the blow was the cause of the death, admits of no doubt; and the principal question for the jury to decide, is, whether this is a felonious homicide.

This term, homicide, denotes any killing of a human being, and is divided into several distinct kinds. And, firstly, homicide may be either justifiable or excusable: *justifiable*, as where a sheriff, in consequence of a sentence against a prisoner, executes him, or where a man being attacked by robbers, slays them, or, in necessary self-preservation, when attacked by others, inflicts a mortal blow; *excusable*, as where a man, either by some unfortunate blow, as by the handle of his axe flying off, or in defence of his person or property, occasions the death of a man. Thus, excusable homicide is divided into two species: the former kind, in the technical language of the law, being denominated *misadventure*, and the latter *chance medley* or *se defendendo*.

The offence of the prisoner is clearly distinguishable from the act of killing another by misadventure; for the blow was given and repeated with violence and anger. But the defence has been principally rested on the ground that this homicide, according to the facts, amounted merely to *chance medley*, in self-defence.

To bring a case within this division of homicide, two important features must mark its character and concur: it must be shown that there was a sudden affray, and that the prisoner, at the time the mortal blow was inflicted, was acting in self-defence.

This was, no doubt, a sudden affray at its commencement; but immediately preceding the time the prisoner assaulted the deceased, the scuffle was at an end, and the parties had entirely separated. It is in evidence that the prisoner, after dropping the basket, advanced on the deceased, and struck him a blow on his left shoulder in anger. The deceased then inquired of the prisoner, why he struck the blow: but to this he made no reply, and gave the second blow, which occasioned the death

Is this either *misadventure* or *chance medley* in self-defence? It is not for the court to *direct* the jury, who are ever, in criminal cases, to judge of the law as well as of the fact, that in their deliberations the offence of which the prisoner is charged, according to the facts in the case, *cannot* be brought within either of these divisions of homicide: suffice it for the court to explain and illustrate to the jury the law on the subject.

Where a man is unlawfully attacked, as by robbers, for his own preservation, he has a right to slay them, and the killing is *justifiable* homicide; but where in a sudden affray, and in heat of blood, a man, in self-defence, inflicts a mortal blow on the aggressor, the law, in compassion to human infirmity, will *excuse* him; but still, it must appear that he was acting in *self-defence*, and, if pressed by the adversary, if consistent with personal safety, must retreat: for should there be an entire separation of the parties, and he who was attacked should renew the combat, he then becomes an aggressor; and should he press on the original assailant and kill him, this offence amounts to a felonious homicide. The doctrine on this subject cannot be better illustrated than by the case read from the book by the counsel for the prosecution; for, in that case, the original assault was more violent than in this; and the party attacked was not able to avoid the blows nor escape: still the killing did not appear to be the result of *inevitable necessity*.

Manslaughter may be denominated an *unlawful* and voluntary killing of a human being without malice express or implied; and as this species of homicide is generally marked by transport of passion or heat of blood, it is only distinguishable from murder by the exclusion of *malice*. It is true that these offences, in many instances, approximate so near to each

other that their shades of difference are scarcely perceptible, and it becomes extremely difficult to distinguish them ; but still, *malice* constitutes their great and characteristic distinction.

It has been strenuously insisted in this case, that as the prisoner at the bar was not actuated by *malice*, either express or implied—as he did not *intend* to kill his adversary, that this homicide does not amount to manslaughter, but may rather be referred to *misadventure*: but, in the opinion of the court, the *want* of *malice*, so far from reducing this homicide to *misadventure*, chiefly serves to exculpate the accused from the highest grade of homicide : for, in this case, had he *intended* to kill, the offence would have amounted to *murder*.

According to the definition of manslaughter, an important inquiry arises in this case ; was the prisoner at the bar *lawfully* engaged, at the time the mortal blow was inflicted ?

There is no question but that M'Mullen had a right, in the first instance, to make use of so much force as might be necessary to remove the prisoner from the store. The case, however, does not turn on this point. It appears that after he had been turned out, he, then, attempted to force his way back, and while he was thus unlawfully employed the deceased interfered in the assistance of M'Mullen. The prisoner had been prevented from entering the store, the struggle had ceased, and the parties separated, when he struck a violent blow on the left shoulder of the deceased, who made no resistance. He inquired of the prisoner the reason of the violence, but received no answer. The fatal blow was then inflicted. That this attack made by the prisoner was unlawful, is obvious ; for had the blow not proved mortal there is no question but that he would have been subject to a prosecution for an assault and battery.

There are some circumstances, it is true, in extenuation of the prisoner's conduct: he used no unlawful weapons—the means were not calculated to produce death—there was some provocation : but these circumstances are subjects of consideration with the court in apportioning the punishment, and ought not to influence the verdict.

The prisoner was convicted and sentenced to the State Prison three years.

(FORGERY—SCIENTER.)

DENNIS DOUGHERTY'S CASE.

VAN WYCK, *Counsel for the prosecution.*
GARDENIER and PRICE, *Counsel for the prisoner.*

On the traverse of an indictment for passing counterfeit money, for the purpose of establishing the *scienter*, the public prosecutor will be permitted to show that the prisoner, previous to the time laid in the indictment, passed other counterfeit bills: but should it appear that these bills were passed at a time remote from the others, and no circumstance is produced on behalf of the prosecution tending to establish the *scienter* in relation to the principal offence, the jury may acquit the prisoner, especially if he is supported by testimony of good character

Where, in such case, no connexion appears between the offence laid in the indictment and that produced to establish the *scienter*, and the offences appear distinct, however strong may be the evidence of the *scienter* applied to the *accessory offence*, the jury will not be justified in finding the prisoner guilty of the *principal offence*.

The prisoner cannot be convicted of an offence not laid in the indictment.

The prisoner, during the term of July last, was indicted for forging, passing, and having in his possession with an intention of passing, two counterfeit $5 bills of the Mechanics' Bank in the City of New-York, on the 18th day of June last.

It appeared from the testimony of William Lane, that on the day laid in the indictment, the prisoner came to the store of the witness for the purpose of purchasing calico, and after having offered Ohio bills, which the witness would not receive because not current, the prisoner offered the bills laid in the indictment, one of which was objected to by Lane, and by the consent of the prisoner, they were sent to the store of a Mr. Kline, in the neighbourhood, for the purpose of ascertaining whether they were good.

The boys, by whom the bills were sent out, not returning, Lane went himself,

and not being able to find Kline, the bills were taken to a Mr. Bruce, who pronounced them to be good.

Shortly after the return of Lane, John O'Dusenbury, one of the police officers, came in, and pronounced both bills bad; and the prisoner, on his return to the store, was arrested, and on being searched, a considerable sum in genuine Ohio and Ontario Bank bills was found in his pocket-book. He told the officer that he had the counterfeit bills of a boy at Fly-Market.

Joseph Clare, one of the tellers in the Mechanics' Bank, proved that the bills were counterfeit, but very good imitations.

After the introduction of the testimony, Van Wyck offered to prove that in November last, at a horse race in Harlaem-lane, the prisoner passed two other counterfeit bills, being then in company with one who was concerned in passing counterfeit money.

On an objection to this testimony, it was admitted by the court.

Jacob Hays, on being sworn as a witness on behalf of the prosecution, testified, that two bills on the Merchants' Bank, the one a $2 and the other a $10 bill, which were then delivered to him by Van Wyck, were counterfeit and badly executed.

John M. Lester, the constable of the fifth ward, on being sworn as a witness for the prosecution, stated, that having heard that the prisoner, with others, was in the habit of passing counterfeit money, and that he would attend the horse race for that purpose, the witness, on the 13th of November last, attended at a race in Harlaem-lane. While there, he heard an outcry that there were two rascals passing counterfeit money. He found the prisoner and one Brady there; and, the prisoner, as was alleged by the by-standers, had passed a $10 counterfeit bill to one Stephen Baxter, who held the stakes, deposited in his hands by the prisoner and a stranger who had laid a wager on the event of the race. At this time the by-standers were upbraiding the prisoner and his companion with much severity; and there was a great dispute between them in relation to the bill, some alleging that it was good, and others, that it was bad. In the height of the dispute, some person took a $2 counterfeit bill, here produced, from under the prisoner's foot, which he said he had chewed up to get it out of the way. The witness shortly afterwards took the $10 bill, now here produced, out of the prisoner's pocket-book.

It was afterwards proved by Baxter, that this was not the bill deposited in his hands by the prisoner at the horse race.

The testimony of Lester having been confirmed by James Van Tassel and Stephen Baxter, the mayor inquired of the public prosecutor whether he had any further testimony to establish the *scienter* as respected the principal offence. His honour understood this to be the rule applicable to a case of this description. The public prosecutor, after having so far established the offence laid in the indictment as to excite a well grounded suspicion of guilt—after having brought the scales of evidence on an equipoise, may then resort to extrinsic testimony; and, by showing that the prisoner passed other false money, establish the *quo animo* in the principal felony. But when no circumstance of suspicion is attached to the principal offence, and the accessory offence appears to be a distinct transaction, however violent may be the presumption of guilt in such transaction, the prisoner cannot be convicted Otherwise, a man might be convicted of a crime not charged in the indictment.

Alexander Kilpatrick, an approver, was hereupon introduced and sworn as a witness for the prosecution. He stated that he was the landlord of the Middle-district Hotel, a short distance from this city, and that during the last summer he had frequent conferences with the prisoner on the subject of counterfeit money. There was a man by the name of Allen, a companion of the prisoner, whom he introduced to the witness as one engaged in that kind of business; and during the winter they came frequently together to the house. This Allen hired a separate room from the witness; and some time last fall called the witness into the room and showed him $5000 or $6000 in counterfeit money, which he had signed himself, and offered some to the witness. He staid in the house about three

weeks, but had a house in which he resided in this city.

Early last spring the witness came to this city in a wagon for the purpose of giving information to the police; and in the upper end of the Bowery, while looking for the directory to find where Hays lived, saw one M'Donald, to whom he imparted the information that persons were at his house engaged in passing counterfeit money.

The witness also told Lester, the witness on this trial, while he was in the garden of the witness, that there was money buried near a particular tree.

It appeared further, from the relation of this witness, that during the last spring he purchased of Peter A. Mesier 4000 sheets of paper adapted to the purpose of counterfeiting, for which he gave about $100.

The witness never heard Allen and the prisoner converse together, but he came to the house several times, and went up into the room of Allen; and about the time that the house of Allen was searched, the prisoner told the witness that Allen put a quantity of counterfeit money in the crown of his hat, and thus eluded the vigilance of Hays, the officer who searched the house.

Lester, on being again called, testified, that in the month of November last, while in the bar-room of Kilpatrick, the witness, in company with John G. Grenzebach and others, a gentleman passed a $3 bill at the bar, and received a $2 counterfeit bill in change, which was taken back and a good one given in exchange. Kilpatrick then called the witness into the garden, and told him that he wished to disclose to him a secret; and, after having enjoined him to keep the secret about to be imparted, inquired of him whether he would become concerned in counterfeiting; alleging that Justice Hedden, one of the police magistrates, was concerned, and that he had a large quantity of counterfeit $10 bills, some of which Flewwelling had examined, and thought them good; and that should there be any difficulty about passing these bills, and any one should be taken to the police, Hedden would screen him. Kilpatrick further informed the witness, that last night he had been up until three o'clock signing bills.

The witness was much surprised at the proposition of Kilpatrick to him, as he had known him a number of years; and the witness told him that it was a subject on which he wanted time to consider. He disclosed the affair to Hays.

From the testimony of Stephen Baxter, a witness on the part of the prosecution, it appeared that the prisoner called on him during the race at Harlaem, and requested him to hold the stakes on a bet of $5 between the prisoner and a stranger, who put $5 in the hands of the witness, which the prisoner, at the same time, took from the witness, and put instead thereof the $10 bill, spoken of by the other witnesses. This bill was afterwards returned by the stranger as a bad bill, and after some dispute and altercation was exchanged by the prisoner for a good bill, who, apparently in a fit of vexation, put a counterfeit $2 bill in his mouth, and having chewed, stamped it under foot. This was one of the bills now here produced.

The prosecution having rested, the counsel for the prisoner called on Robert M'Queen, the Alderman of the fifth ward, Samuel Trumbull, Stephen Burdett, and Ezra Frost, assistant justices, John White, Patrick Benson, Paul Gallaudet, Jacob Hays, George Gardner, and Dr. George Cummings, who concurred in stating from an acquaintance of a number of years, and from dealing with the prisoner in his official capacity, as constable of the fifth ward, that his character for honesty and integrity was unexceptionable.

The cause was summed up by Price, and Gardenier on behalf of the prisoner, and by Van Wyck for the prosecution.

The mayor, in his charge to the jury, stated, that it having been proved that the bills laid in the indictment were counterfeit, and that they were found in possession of the prisoner, the principal question for the determination of the jury was, whether, at the time he offered them to Lane, he knew them to be counterfeit. On this question, the jury must resort to the circumstances in the case; and if they shall be found to be of that complexion as to afford a just inference of that know-

ledge in the mind of the prisoner, he ought to be convicted.

At an early stage of the cause, the court had expressed an opinion, which it would be the duty of the jury to take into consideration in their deliberations.

Whenever a prisoner is put upon his trial, the public prosecutor must produce evidence of the matter charged against him in the indictment: and the jury, who are to pass in the case, must be convinced that he is guilty of *that* offence before he can be legally convicted. But, in cases of this description, courts have permitted evidence of a secondary character to be introduced on behalf of the prosecution, for the purpose of showing the intent with which the offence charged was committed; and the true rule on this subject is this, that where the public prosecutor produces evidence of the fact charged, but, perhaps, not sufficient to bring the mind to a decided conclusion of the prisoner's guilt, there, he may successfully resort to this secondary species of testimony for the purpose of establishing the *scienter*. But where no fact or circumstance, showing the guilt of the prisoner, attaches itself to the principal offence, whatever may be the circumstances of suspicion with which his conduct may be marked in other and distinct transactions, he ought not to be convicted; because no man can legally be found guilty of an offence with which he is not charged in the indictment.

In taking a view of the circumstances relied on by the counsel for the prosecution, as furnishing evidence of the knowledge of the prisoner that the bills attempted to be passed were counterfeit, the court perceived but one fact which could possibly have that effect; he said, when arrested, that he obtained the bills from a person at the Fly-market, and on this occasion, he produces no evidence to account for the possession of the bills; but considering that there is frequently a difficulty in tracing a bill, which may have come, *bona fide*, into the possession of another, back to the original holder, little reliance can be placed on this circumstance. When arrested, the prisoner manifested no uneasiness: he returned to the store but a short time before the arrest, and did not attempt to escape: and if we look at the whole of his conduct on that occasion, we do not find it marked with that fear and agitation which are usually the concomitants of guilt.

In short, independent of the transaction relied on by the public prosecutor, to establish the *scienter*, we look, but in vain, to any circumstance connected with the offence charged in the indictment, as affording evidence, that the prisoner, at the time he offered the bills to Lane, knew them to be counterfeit. But should the jury differ from the court in the opinion already expressed on the subject, it will be necessary to recur to the transaction in which the prisoner was engaged at the race.

There is no evidence that the bill passed at the race was a forgery: it is not produced; and even if the prisoner had, at that time, acknowledged that it was counterfeit, this would not afford satisfactory evidence that it was, in fact, counterfeit, without its production.

The relation of Kilpatrick is relied on by the prosecution, as affording evidence of the prisoner's guilt. An accomplice is a competent witness; but the situation in which he stands in a court of justice, renders it incumbent on the jury to scrutinize his testimony with much strictness; and unless it is found corroborated, it cannot be relied on with safety. The court did not consider the testimony of this witness entitled to credit. He was not corroborated in any circumstance whatever; and from his own story, it appears he harboured a man whom he knew to be engaged in counterfeiting, and was aiding and assisting him in that business.

Upon the whole, this was a case, in the view of the court, in which good character is entitled to weight in the mind of the jury in determining on the guilt or innocence of the prisoner.

He was acquitted by the jury.

(GRAND LARCENY—EVIDENCE.)

GEORGE BROWN'S CASES.

Indicted with BUMPO, *a black.*

VAN WYCK, *Counsel for the prosecution.*
WILSON, *Counsel for the prisoner.*

Though the public prosecutor cannot introduce

other witnesses *for the purpose of discrediting* a witness on behalf of the prosecution, yet he is not precluded from *contradicting facts* previously sworn to by his own witness.

Where a case, on the proof, stands *as strong as possible*, it is injudicious, and sometimes ruinous to attempt to make it *stronger*. (See 1 Vol. of the City-Hall Recorder, p 62.)

Brown was charged with grand larceny on two indictments: on one, for stealing a coat of the value of $40, the property of Jacob Lorillard; on the other, with Bumpo, (who, at the time of the trial, stood convicted,) for stealing $40 in bank bills and specie, the property of Amory Morse.

On the traverse of the first-mentioned indictment, the most satisfactory proof was given by the owner of the coat, *that it was stolen;* and, by Jacob Warner, one of the police officers, *that it was found in possession of the prisoner*, at the house of Mary Smith, who was, at the time of the trial, in custody, on a charge for felony, or for a misdemeanor. He stated to the officer, that he gave $13 for the coat, and intimated that he bought it of Bumpo

Hereupon the examination of the prisoner in the police was read, stating that the coat was made for him at Lynn, and cost him $30.

After the introduction of this testimony, the public prosecutor called on Mary Smith as a witness; when she was brought out of the cage, and on being sworn, stated that the prisoner staid at her house, and that *Bumpo* brought the coat there when the prisoner was within, who took $10 out of his trunk, and, borrowing of the witness $3, paid Bumpo $13. It further appeared that before the prisoner was arrested, he had declared that he gave $13 for the coat.

After the arguments of the counsel, the mayor in his charge to the jury, after adverting to the prominent facts in the case, said, that had the public prosecutor suffered the case to stand on the testimony of Mr. Lorillard, and that of the officer who arrested the prisoner, there could have been no doubt of his guilt; for the *loss of the goods* and their subsequent *possession by him*, was the ordinary proof given in cases of this description, and was sufficient to render it incumbent on him to account satisfactorily for such possession. The account, too, which the prisoner had given in his examination in the police, and also to the officer, concerning the possession of the coat, and the price paid, was utterly inconsistent. The case, therefore, at that stage, stood, on the part of the prosecution, as strong as possible.

But here the *public prosecutor* has introduced Mary Smith as a witness; who, if her testimony is to be believed, completely exculpates the prisoner. This witness, according to the established rules of evidence, cannot be impeached on the part of the prosecution; for a party, by calling on a witness, professedly holds such witness forth to the world as entitled to full credence: still the jury, whose exclusive province it is to determine on the credit to be given to the relation of a witness, are not, therefore, bound to believe her testimony.

The prisoner was acquitted on this indictment.

On the traverse of the other indictment, it was proved by Morse, that he came with a wagon from his place of residence, near Boston, to this city, and put up at the Bull's Head tavern, in the Bowery, on the 14th of September. He left his trunk in the wagon, which was put into the yard; and went down into the city. On his return, the trunk, containing his money and a quantity of combs, was stolen. He heard that *a black man* had been seen about the yard, and the next morning, in company with Warner, the police officer, went to the house of Mary Smith, (24 Cross-street,) where the prisoner was found in bed, apparently intoxicated. The house was searched, but the trunk was not found.

Mary Smith was introduced as a witness *for the prosecution*, who stated that the trunk was brought to her house by Bumpo, when the prisoner was absent; and it appeared from her statement, that the trunk was burned up by Bumpo, in a room in her house, in which the prisoner was in bed intoxicated.

After the introduction of this testimony, the public prosecutor called on Charles N. Burnet as a witness, who, on

being sworn, was about stating *facts contrary to the testimony of Mary Smith.*

Wilson objected to the evidence, on the ground that the public prosecutor could not *impeach* his own witness.

Van Wyck, contra.

The court overruled the objection; and the mayor, in the decision, remarked, that although it was not competent for the public prosecutor to call other witnesses for the purpose of discrediting his own witness, yet he might introduce testimony for the purpose of showing *the facts to be contrary* to those sworn to on his behalf; otherwise, during a trial, a party who had, in the first instance, called on a witness whom he reasonably expected would establish certain facts, might be taken by surprise, and defeated of a just claim, while he had it in his power, if permitted, by the introduction of other witnesses, to prove clearly that the facts were different.

The amount of the subsequent testimony seemed to be, that this house of Mary Smith was a nest for thieves; but it did not appear that the prisoner stole the property laid in this indictment or that it was found in his possession.

He was acquitted by the jury.

(HEARSAY EVIDENCE.)

GEORGE KELLY'S CASE.

VAN WYCK, *Counsel for the prosecution.*
PRICE *and* WILSON, *Counsel for the prisoner.*

Where, on the traverse of an indictment for larceny, the owner of the goods doth not appear, the prisoner will be allowed to show that, immediately after the felony was alleged to have been committed, the owner acquitted him from blame, and alleged that he was satisfied; having found the goods about his own person.

The prisoner, a hackney coachman, was indicted for grand larceny, in stealing a silver watch of the value of $40, the property of John Westcott, on the 26th of September last.

The owner did not appear, having, before the trial, sailed for England; but Thomas Corning, Samuel Moore, and John Clark, three intelligent lads, all concurred in stating, that, being at the lower end of the Park together, they saw the prisoner, while helping Westcott to descend from the coach, who was then much intoxicated, pull that gentleman's watch from his pocket and put it in his own.

The prisoner then ascended the coach, turned it, and was proceeding up Broadway, when Westcott, having missed the watch, called on the prisoner, and told him of the loss, who then said that he must have left it with the woman at the place where he had been. Westcott then engaged the coachman to carry him back, and they shortly afterwards returned, when the owner had his watch.

The counsel for the prisoner offered to prove that Westcott, when he returned, declared that he was well satisfied; for that on the way he found the watch in his waistcoat pocket, and, thereupon, stopped the driver, and directed him to turn about.

Van Wyck objected to the testimony offered; inasmuch as Westcott was absent; and his declarations were but hearsay testimony, which is ever inadmissible.

Price and Wilson, contra.

The mayor decided, that the prisoner was entitled to the benefit of the declarations of Westcott, made at the time, as part of the *res gesta.*

Two witnesses, on behalf of the prisoner, then swore to the declarations of Westcott, as above stated; and one of them also testified, that he was present at the time spoken of by the boys, and was certain that the prisoner did not pull the watch from Westcott's pocket; but that *after Westcott had descended from the coach*, the prisoner pulled out his own watch to see the time of day: but the boys, on being again called, were positive that they saw the prisoner pick Westcott's pocket of the watch, as before related.

The cause having been left to the jury, after the arguments of the counsel and the charge of the court, he was found guilty, and on the last day of the term was sentenced to the Penitentiary two years.

(CONSTRUCTIVE FELONY.)

JOHN O'TERRE'S CASE.

VAN WYCK, *Counsel for the prosecution.*
WILSON, *Counsel for the prisoner.*

Where a man, at the time he obtains goods at a store, alleges that if one of the two boys who sold him the goods will go with him to a certain place he would pay for the property; and on the way represents that they were purchased for a rich lady, who would pay, &c.—should he go off with the property and convert it to his own use, he is liable to a conviction for a felony, should the jury believe that, at the time he acquired possession, he *intended* wrongfully to deprive the owner of his goods.

In such case, the prisoner would not be liable to an indictment for obtaining goods by false pretences; the false representation not having induced a delivery of the goods.

The prisoner, a Frenchman, was indicted for petit larceny in stealing two silk handkerchiefs and other articles, of the value of $10, the property of William Lane, on the 12th of August last.

Henry Lane, a lad about thirteen years of age, in a clear, distinct and audible manner, and with a propriety of expression we have scarcely, if ever, heard equalled, stated, that the prisoner came to the store when the witness and another boy were there, and inquired for ladies' silk handkerchiefs. A number was shown him, when he took up two, and, without examination, laid them together, and pursued the same course, with regard to the other articles shown him, until he had called for goods to the amount of $10. He then said that if one of the boys would go with him, he would pay the amount. The witness sent for his father, who sent the two boys with the prisoner; and on the way he told them that *he had purchased the goods for a rich lady*, then boarding at the City-Hotel, where, on their arrival, he told one of the boys to wait at the door. He went up stairs, under pretence of seeing the woman, returned again, and then went off without having paid for the goods. Some time afterwards, he was found by the witness and his father at the Theatre Hotel, and from thence was taken to the police.

After the production of this testimony, Wilson contended to the court that this was not a case of felony; for the goods came into the possession of the prisoner by the delivery of the owner, in consequence of the false representations made to him. The indictment, therefore, should have been *for obtaining goods by false pretences.*

Van Wyck was stopped by the court; and the mayor, in the decision, remarked, that this was exactly the case of a constructive felony; provided the jury should believe, from the circumstances, that, at the time the prisoner obtained the goods, he harboured an intent to convert them to his own use without paying the owner.

In this case, an indictment for obtaining goods by false pretences could not have been maintained; for the prisoner acquired possession of the goods *on his own credit.* Had he represented in the store, that a rich lady at the City-Hotel had sent him for the goods, and, on the faith of that representation, the lad had delivered them, the prisoner would have been liable to a prosecution for a misdemeanor; but it does not from thence follow that he would not have been also liable to a prosecution for a larceny. But it appears that, in this case, the representation concerning the lady was made, incidentally, after the prisoner had obtained the goods and left the store.

He was immediately convicted, and sentenced to the penitentiary six months.

(CONSTRUCTIVE FELONY.)

TOBIAS M'CLURE'S CASE.

VAN WYCK, *Counsel for the prosecution.*
DR. GRAHAM, *Counsel for the prisoner.*

A lad taken on trial, while in the employ of the principal, was sent by him to carry goods to a particular place; but the lad took them to auction and had them sold, intending to convert the avails to his own use—it was held, that this was a constructive theft.

A special verdict was found by the jury on the following facts: the prisoner, a lad taken on trial by James Munell, while in his employ, was sent by him from his leather manufactory, in Ferry-street, to carry twelve dozen lambskins to a person to whom he had engaged to deliver them in

Newark, in New-Jersey. The prisoner took the skins from the manufactory in a wheelbarrow; but, instead of following the directions of his master, carried them to auction, had them sold, and made an appointment with the auctioneer to call at a subsequent day to receive the money. The master having ascertained that the skins had not been delivered, and that they had been sold at auction, came, in consequence of a previous arrangement with the auctioneer, at the time the prisoner called for his money, and detected him.

On the production of this testimony, the prisoner being on trial for grand larceny, Dr. Graham contended for an acquittal of the prisoner, on the ground, that this was but a breach of trust.

Van Wyck, contra.

The mayor said that, although he was not positive, yet, he was inclined to think that this was a constructive felony, provided the jury should believe from the circumstances that, at the time the prisoner received the skins, he intended to dispose of them at auction for his own benefit. But, as there was some doubt, the jury might find a special verdict.

After the verdict, Dr. Graham produced to the court an authority (2 East's C. L. p. 566.) showing that he was mistaken in the law. He, therefore, gave up the ground assumed.

Judgment against the prisoner on the verdict. He was sentenced to the State Prison three years.

(FRAUD.)

ELI B. MOTT'S CASE.

VAN WYCK, *Counsel for the prosecution.*
BOGARDUS, *Counsel for the prisoner.*

To obtain a gun from the wife, in the absence of her husband, by falsely representing to her, that he had authorized its delivery for the purpose of repairing it, is a misdemeanor within the statute against obtaining goods by false pretences.

On the traverse of an indictment against the prisoner, for obtaining a gun belonging to Arthur M'Dermott, of Catharine, his wife, by false pretences, it appeared, that, in his absence, the prisoner came to her at the house, and falsely represented that her husband sent him for the gun, to repair; and she then got it for the prisoner, who carried it off and converted it to his own use.

Bogardus said, that the only question in this case was, whether this was a false pretence within the act: he should insist that it was but a mere naked lie. The counsel adverted to the case of Cromwell and Field in this court, (Ante, page 34,) and suggested the propriety, at least, of a special verdict, to have the question argued before the court.

The mayor, in the decision of the court, observed, that the jury were never advised to find a special verdict, except where there was a doubt concerning the law. But in this case there is not the least doubt, but that the offence of the prisoner comes within the statute, according to the principle upon which all the decisions, in similar cases, are founded. This was a false representation relative to an existing fact—a pretence against which ordinary prudence could not guard. Should the jury, therefore, believe, that by *means of this pretence* the gun was obtained from the woman, the prisoner ought to be convicted.

He was immediately found guilty.

In the Court of Chancery holden in and for the state of New-York,

BEFORE

The Honourable
JAMES KENT, Chancellor of the said state.

"*Et quorum pars magna fui.*"

(SPECIFIC PERFORMANCE—SET-OFF.)

ABRAHAM WINANS
vs.
JOHN LA GRANGE.

E. WILLIAMS, *Counsel for the complainant.*
T. SEDGWICK, *Counsel for the defendant.*

In the Supreme Court of Judicature of the state of New-York,

BEFORE

The Honourable
SMITH THOMPSON, *Chief Justice,*

AMBROSE SPENCER,
WILLIAM W. VAN NESS,
JOSEPH C. YATES, AND
JONAS PLATT,
} *Justices.*

(COSTS ON SETTING ASIDE PROCEEDINGS ON A BAIL BOND—IRREGULAR DEFAULT.

ABRAHAM WINANS,
Ads.
MARY VAN NAME,
Executrix &c. of
MOSES VAN NAME, *deceased.*

The same Defendant,
Ads.
CALEB HALSEY.

COLLIER, *Attorney and Counsel for the plaintiffs.*
ROGERS, *Attorney and Counsel for the defendant in the first, and*
WATERMAN *in the second entitled suit.*

Entering into possession under a parol agreement to convey, continuing in possession, making improvements, and paying moneys towards the land to the owner, who, immediately preceding the time the complainant entered into possession, procured the land to be run out by a surveyor, are acts of part performance, which, in equity, will take the case out of the statute.

Where in such case the purchase money, in 1807, amounted to $1600, and the complainant, in 1808, advanced more than $1300 towards the land, and, about the same period, the defendant, without the knowledge of the complainant, purchased a sealed note against him amounting to $336 for half that sum, the chancellor did not permit that note, and an unliquidated account, to be set off against moneys so advanced for the land, but left the defendant *quoad* his demands to pursue his legal remedy

It is inconsistent in an answer to a bill suggesting that the complainant advanced moneys *towards the land*, amounting to $1300, to allege that the complainant being in embarrassed circumstances, he, the defendant, (being a man of property,) borrowed those moneys of him from time to time, and in other parts of the answer that these moneys were intended to be set off against his account, including the note, when, by his own showing, there would, in case of such liquidation, remain due to the complainant $700

Though the complainant had even agreed to receive a deed, and execute a bond and mortgage to the defendant on the balance of an account drawn and stated by him, wherein the sealed note is included, and he agreed *to execute the deed at a stated period*, yet, if he do not execute such deed, and it appear that an undue advantage was taken by him of the complainant's situation, he is absolved from his agreement.

Though the costs are to be paid by the defendants *instanter*, where proceedings are set aside on the bail bond on the usual terms, yet a default entered in the original suit, *on the same day* the order of the court, setting aside such proceedings, is entered, was held *irregular*.

It seems that a party, on whom the terms of paying costs *instanter* are imposed by an order of the court, is entitled to at least *twenty-four hours*.

Where the attorney for the plaintiff, immediately after the court had set aside proceedings on the bail bond, on the payment of costs, entered a default in the original suit, and subsequently received the costs of such proceedings of the defendant, to whom the entry of the default was unknown, it was held that the reception of the costs was a waiver of the default.

In conducting this publication, the painful duty has devolved on us, as well *to trace the devious windings of fraud*, as to *exhibit crime* in its glaring deformity. For the *latter* we have generally witnessed an adequate degree of punishment annexed; but not so in all instances for the *former* But where a case of this description can be selected, in which fraud and avarice—unnatural feeling and deliberate cruelty united, at every step meet with disgrace, discomfiture, and defeat, the ingenuous mind surveys the interesting spectacle with complacency, and even the skeptic is induced to believe that there is a God who sways and directs the affairs of men with unerring rectitude.

John La Grange, a man now in the vigour of manhood, previous to the year 1807, removed from Elizabethtown, in New-Jersey, to the town of Union, in the county of Broome, and purchased a considerable tract of land on the Susquehanna River. He invited Abraham Winans, his brother-in-law, then upwards of sixty years of age, to remove to Broome, who disposed of a valuable place in Elizabethtown, and removed near La Grange, in Union. Winans purchased a valuable farm on the Susquehanna; and one William Drake having come from New-Jersey to Union, to purchase a place, La Grange, then the professed friend and adviser of Winans, who placed implicit confidence in him, induced him to sell his farm to Drake, and purchase 90 acres of himself, a part of the same tract of which La Grange was in possession. He agreed verbally with Winans that he would sell the land to him at $18 an acre: that he would take a bond and mortgage, payable in instalments, to suit the convenience of Winans, who might enter into immediate possession.

In May, 1807, La Grange procured a surveyor, run out the land to Winans.

and, according to an estimate made, the purchase money amounted to $1620. At this time he went into possession, planted an orchard, and made other improvements.

He continued in possession; and, previous to the 16th of August, 1808, paid and advanced towards the land more than $250. On that day he received a bond and mortgage from Drake for $1167, and on the earnest solicitation of La Grange, assigned and transferred these instruments to him, and he afterwards received their avails. These several payments were expressly alleged in the bill in chancery to have been advanced towards the land; but it appeared that for the sums advanced previous to the 16th of August, La Grange, a man expert in business, had merely given Winans *a loose memorandum in writing*, and with regard to the $1167, on the day the bond and mortgage were transferred, La Grange engaged an attorney to draw a covenant to Winans, whereby La Grange agreed to re-assign the bond and mortgage in a limited time, or account with Winans for the money. But it clearly appeared from the depositions of Drake and his wife, that La Grange had frequently told them that the money they paid towards their land, was to go towards that of Winans.

With regard to the specific object for which this money was advanced, and the bond and mortgage assigned, La Grange, in one part of his answer, swore that it was borrowed money, and that Winans let him have the bond and mortgage to carry to New-York, where he was to purchase land, that he might thereby be enabled to represent himself a man of property. In a previous part of the answer, however, he alleged that Winans, about the time he lent this money and assigned the bond and mortgage, was in embarrassed circumstances, and unable to pay his debts!

In February, 1806, before the removal of Winans from New-Jersey, he became indebted to Caleb Halsey, a respectable gentleman of Elizabethtown, and a brother-in-law of Winans, in the sum of $312, for which he gave his sealed note, and he also became indebted to Moses Van Name, of Staten Island, another brother-in-law, in the sum of £50, for which a promissory note was given.

About the time La Grange made the parol agreement to convey 90 acres, as before stated, he went down to New-Jersey, and represented to Halsey that Winans was much embarrassed; but that he, L. G., thought he might get *a part of the money of him*, due on the sealed note. By reason of such representations, Halsey assigned this instrument to La Grange, and received *his promissory note* for $170, which was not paid to Halsey until the summer of 1814, when it was collected by execution.

After the payment of these several sums of money, and the assignment of the bond and mortgage to La Grange, he frequently promised Winans a deed for the 90 acres; but in the month of April, 1811, Winans was invited by La Grange to his house, where he exhibited an account, stated by himself, between them, in which he charged *compound interest on the* $1620 *as and for rent*, and also included the sealed note and interest with a book account: and, crediting Winans for the moneys he had advanced, including the bond and mortgage, there appeared to be a balance due him of about $700.

La Grange for this balance, as he states in his answer, offered Winans another piece of land, which he alleges to be worth $1000, but which, in truth, was a piece of wild land in a remote place. Winans objected to the injustice of the statement and of the offer, and insisted on the deed for the 90 acres. Considering himself, however, in the power of La Grange, he at length agreed to receive a deed and give a bond and mortgage for the balance, stated as aforesaid by La Grange, being about $900. The deed, bond, and mortgage were about this time drawn by L. G. and were to be executed at a given day: but La Grange never executed the deed, because (as he alleged in his answer) Winans did not come at the time!

From that time until the month of August, 1813, La Grange repeatedly promised a deed, and sometimes refused when earnestly solicited by Winans to perform the contract; and on that day sent for him, and, in presence of two neighbours, exhibited another *conscientious* statement, wherein the balance made to be due to Winans had dwindled down to $450: but,

nevertheless, La Grange made him the *magnanimous* offer of remaining on the place one year longer, and, at that time, paying him $500 on quitting possession; whereas the improvements were worth nearly that money.

In September, 1813, Winans having consulted counsel, again requested a deed, and shortly afterwards La Grange offered him one and demanded his money, but not any specific amount. He afterwards called on Winans, while at work in the field, and offered a deed, and again demanded *his money*, which not receiving, he counted out about $600 in Orange county bills, which he also tendered.

About the middle of October following, La Grange gave Winans a written notice to quit possession, threatening an ejectment: and, the balance due to La Grange for the land having been ascertained, Winans called at his house three several days in succession with $460, in specie, to tender him. La Grange was at home, at least on one of these days, but avoided the complainant.

During the same month a bill in chancery was filed by Winans against La Grange for a specific performance of his contract to convey, and an injunction to prevent the threatened ejectment was prayed for in the bill, and granted.

The answer was filed in the winter of 1813, and the amount of the defence attempted was, that although a parol contract was made to sell the land to Winans, yet, he being unable to perform, it was afterwards varied in its terms and finally abandoned by him: and that if any contract existed, by which La Grange was bound to convey, it was on the express terms, agreed to by Winans, *that the sealed note and book account should be set off against the moneys Winans had advanced.* To establish this seemed to be the principal object of the defence, and was *the hinge* on which the whole cause turned. For it is obvious, that to have rested the defence on the ground that the moneys advanced by Winans *were not paid towards the land*, was absurd; inasmuch as when the bond and mortgage of Drake were assigned, according to the proceedings on the face of the bill and answer, there was a balance due Winans of more than $700: and that the instrument given by La Grange to Winans on the assignment of the bond and mortgage was fraudulent was as clear; for, if it was intended to re-assign this security, why did La Grange receive its avails?

The commission to examine witnesses was executed in Broome, in the winter of 1814 and 15, and the rule for publication passed the May following. The depositions on both sides were numerous, and some of them lengthy. Those on behalf of the complainant, presented a mass of facts which conclusively established the material allegations in the bill. How the answer was supported, will appear from the decree hereafter mentioned. There was, however, one curious allegation and *exhibit* in the answer, which deserve notice: La Grange alleged, that in consequence of the *abandonment of the contract*, he purchased 180 acres adjoining the 90 acres; and to his answer there was annexed a large map, painted red and yellow, showing that the tract of land, including the 90 acres, was in the shape of a parallelogram, or oblong square. And, what appeared to be of more importance was, *that he had mortgaged the whole parallelogram to the trustees of Columbia College, the same day Winans transferred to him Drake's bond and mortgage.*

The case having been submitted to the chancellor on the proofs, in the month of December, 1817, he made an interlocutory order, in substance, that it be referred to a master to ascertain the balance due from Winans to La Grange upon the contract—directing the amount of Drake's bond and mortgage to be credited to Winans, and allowing to him several other payments denied in the answer, as having been received towards the land, but established by proof.

In the month of March, 1818, the master reported the balance to be due on the 13th of October, 1813, $510, and, upon filing the report the chancellor decreed, that on Winans paying or tendering, on or before the first of May then next, the amount of the master's report, with interest, La Grange should convey the premises, mentioned in the bill of complaint, to Winans in fee; and that the deed should contain a covenant of warranty, particularly against the mortgage to the trustees of Columbia College; and that if the coun-

sel for the parties could not agree, a master should settle the form of the deed.

Winans procured the money, and paid La Grange the amount, and a deed was drawn and tendered him to be executed, which he refused to execute—and his counsel objected that the decree did not order his wife to execute it as a party. In August last, the form of the deed was settled, and again tendered for execution :—again La Grange refused; and in September, the chancellor made an order that La Grange execute that deed by the last Friday in September, or show cause why an attachment should not issue against him. On showing cause, La Grange prayed for time until the first of November then next ensuing, on the ground, as alleged in a number of affidavits, that a default having been entered in the suit on the sealed note, hereafter to be noticed, he expected to have judgment perfected thereon in the October term, and that if a deed was executed until after that judgment, *the land would be conveyed away and he would lose his debt.* This application was granted, and he was required peremptorily to execute a deed on the first of November, or that an attachment issue without further notice or application to the court of chancery.

In the first entitled cause in this court, as soon as La Grange had understood the determination of Winans to compel him to give a deed, he went to Staten Island, and procured the note of £50, before mentioned, of his sister, the widow of Moses Van Name ; and in the month of October, 1813, commenced an action in this court. To the declaration the defendant pleaded the general issue, and the statute of limitations. Though at issue, and noticed for trial at the Broome circuit, in June, 1814, it was not brought on. Whereupon, in August term following, a motion was made for judgment, as in case of nonsuit for not proceeding to trial, and the motion prevailed. The judgment was perfected, and execution for about $50 issued to the sheriff of Richmond, returnable at the October term following ; and before term the money was paid. During that term a motion was made on behalf of the plaintiff, to set aside the judgment, which being resisted, the court granted the application on the payment of all costs. As the judgment had been collected, as disclosed in the affidavits in resistance, the defendant's counsel, who drafted the rule and submitted it to the court, understood that the judgment and costs of resistance were intended, and entered the rule to that effect, and obtained a certified copy, and received the costs of resisting the motion.

At the next term a motion *was intended* to vacate the rule entered the preceding term, on the ground that it was variant from the rule intended to be granted ; and that the attorney for the defendant refund a part of the money collected on the judgment, *and also pay the costs of the motion.* It happened that the papers in support of the motion, which were *somewhat bulky*, were served on a person different from the agent of the defendant's attorney ; and, as the rule required that they should be served on the agent, the court dismissed the motion with costs. In the further progress of these collateral proceedings until their termination, the defendant was not behind his adversary, at any time, *on the score of costs.*

Finally, the cause was brought to trial at the Broome circuit in June, 1815, when the plaintiff was nonsuited. The defendant afterwards proposed a compromise, and *voluntarily* executed to the plaintiff a bond for $125, the sum her husband had originally agreed to take of the defendant to the exclusion of interest.

As soon as La Grange had understood the decree of the chancellor, and that he had excluded the sealed note and account, he commenced two actions against Winans : one in Broome common pleas on the account, which suit was afterwards removed into this court, and the other, above entitled, on the sealed note.

The writ was returnable last May term ; and special bail not having been put in, an action was brought on the bail bond. Special bail was perfected ; and the attorney for the defendant, on the 27th day of July last, offered the opposite at-

torney the costs of the proceedings on the bail bond if he would discontinue; but he refused *unless a cognovit was given.*

At the last August term, a motion was made on behalf of the defendant, to set aside those proceedings, on the payment of costs, up to the 27th of July: which motion, being resisted by the plaintiff's attorney, the court granted it on the terms contained in the notice. The order of the court was entered on the *13th of August;* and, *on the same day,* he entered a default in this suit for want of a plea. He returned to Broome, and informed the attorney for the defendant, residing there, of the result of the motion, who soon after paid him the costs on the bail bond, and offered him a plea, which he refused to accept.

During the present term of this court, a motion was made by Mr. Williams, on behalf of the defendant, on affidavits and documents disclosing the above facts, in relation to this cause, to set aside the default with all subsequent proceedings for irregularity, with costs.

This motion was opposed by Mr. Emmet, counsel for the plaintiff, on several affidavits which stated the great solicitude of the plaintiff to get the cause to trial the last Broome circuit, for the purpose of perfecting judgment in August term—the purposed delay on the part of the defendant, and the fears entertained by the assignee of the note, that if he could not retain the default, the debt would be lost, as Winans when he obtained the deed would convey away the land.

Williams contended, that the default was irregular, because the attorney for the plaintiff, having refused to accept the costs on the bail bond, unless a *cognovit was given*, had dispensed with the formality of the tender of any other plea by the defendant, and put it out of his power to serve an issuable plea, until he had ascertained, by an application to the court, whether the offer of the costs on the bail bond was properly made. By granting the order at the last term, the court sanctioned the practice of his attorney, and placed the parties in the same situation they stood on the 27th of July preceding.

Though, perhaps, in strict practice, where proceedings are set aside on the bail bond on the usual terms, the costs are to be paid *instanter*, (Col. Cases, 81. 101.) yet, the attorney for the plaintiff, in this case, had no right, by reason of the nonpayment of costs on the bail bond, to *enter a default.* He had elected to proceed on the bail bond; and on this only could he, regularly, proceed on the failure of the defendant in paying the costs. But the attorney for the plaintiff entered the default on the very day the order for setting aside proceedings on the bail bond was entered, contrary to the spirit of that order; and his reception of the costs afterwards, was a tacit admission of the continuance of the proceedings on the bail bond, and a waiver of the default.

The counsel referred the court to the 1st Caines' 55, and to the 7th of John. 119, to show that proceeding in a bail bond suit is a waiver of the original suit.

Emmet said that by the affidavits read on behalf of the plaintiff, the court would perceive that there was a studied design on the part of the defendant to put this cause over the last circuit, and for that purpose he suffered a suit to be commenced on the bail bond. Besides, it manifestly appeared by one of the affidavits, that unless this default was retained, *the plaintiff's debt would be entirely lost.* The counsel earnestly solicited the court to look at *the equity of the case*, and in the conclusion, insisted that it was the duty of Mr. Waterman, previous to the last term, to have sent to his agent at Albany, an issuable plea for immediate service, and the costs to be paid *instanter.*

By the Court: We think this default irregular. When proceedings are set aside on the bail bond on the usual terms, as in this case, according to the settled practice, the costs to which the party is subjected to whom relief is afforded, are to be paid *instanter.* This, in legal intendment, means within twenty-four hours; and the entry of this default, *on the same day* in which the rule was entered setting aside proceedings on the bail bond, was irregular.

There is another ground: it appears that the attorney for the plaintiff, on his return from Albany, after the last term, received the costs on the bail bond. This we consider as a waiver of the default which he had previously entered.

The motion is, therefore, granted.